

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN LAMONT KELLUM,

Defendant-Appellant.

UNPUBLISHED
February 16, 2006

No. 258197
Wayne Circuit Court
LC No. 04-005132-01

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted of carjacking, MCL 750.529a, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 10 to 20 years' imprisonment for the carjacking conviction, one and a half to five years' imprisonment for the felon in possession of a firearm conviction, and to a consecutive sentence of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues on appeal that prosecutorial misconduct denied him a fair trial. We disagree. When properly preserved, claims of prosecutorial misconduct are reviewed by this Court de novo. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). In doing so, this Court reviews the record to "determine whether defendant was denied a fair and impartial trial." *Id.* Where issues of prosecutorial misconduct are not preserved, this Court reviews the record for plain error affecting substantial rights, and will only reverse if the "error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Id.* at 448-449 (citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999)). Therefore, "where a curative instruction could have alleviated any prejudicial effect [this Court] will not find error requiring reversal." *Id.* at 449 (citing *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001)).

Defendant alleges four acts of prosecutorial misconduct; however, defense counsel only objected to two of the four alleged acts below. Therefore, the allegations that were properly preserved will be analyzed according to the de novo standard of review and the issues not preserved below will be analyzed according to the plain error rule.

Defendant claims that he was denied a fair trial when the prosecutor, despite objection of defense counsel and orders of the trial judge, continued to question a witness about her reason for being at the location from where defendant was arrested. The prosecutor, on two occasions, questioned the witness regarding her reason for being at that location, even though the witness, in previous testimony, provided an answer to that question and the court established that the witness was at that particular location because she was instructed to do so. However, even if the conduct of the prosecutor was improper, it did not deny defendant of a fair trial, and therefore, warrant reversal. “This Court does not believe a case should be reversed because a few technically improper questions are asked.” *Watson, supra* at 588. When the prosecutor questioned the witness on those two occasions regarding her reason for looking for the green Tahoe, the court reminded the prosecutor that the question was asked and answered. Defendant asserts that the prosecutor’s questioning was improper and denied defendant a fair trial. However, this Court has found that “[i]n order to require a reversal some prejudice or patterns of eliciting inadmissible testimony must be shown.” *Watson, supra* at 588. If the questioning did not prejudice the defendant, reversal is not warranted. *Watson, supra* at 588. In the present case, the prosecutor did not elicit any inadmissible testimony by repeating the question concerning the witness’ reason for being at that location. Because the witness was permitted by the court to answer the prosecutor’s question the first time it was asked and, thereafter, the court established that the witness was there because she was instructed to do so, the prosecutor’s questioning was not so improper such that defendant was denied a fair trial.

Defendant next claims that he was denied a fair trial because the prosecutor mischaracterized evidence. Defendant claims that since the weapon was recovered underneath the backseat of the vehicle in which defendant was a passenger, the prosecutor, during closing argument, mischaracterized the evidence by implying to the jury that the weapon was in defendant’s presence. However, the record does not support defendant’s claim. It was not improper for the prosecutor to infer that a weapon was in defendant’s presence since an assault rifle was recovered from the backseat of the vehicle in which defendant was a passenger. This Court has found that “a prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence.” *Ackerman, supra* at 450. Defendant was identified as the front passenger of the vehicle in which weapons were found. Underneath the backseat of the vehicle an assault rifle was found and two more handguns were recovered from the vehicle. Given the evidence, it was reasonable for the prosecutor to infer that weapons were in defendant’s presence.

Moreover, even if the statement made by the prosecutor was improper, during jury instructions, the court instructed the jury that the arguments of counsel do not constitute evidence, and that they, as jurors, must determine for themselves the facts of the case based on the evidence presented. This Court has found that reversal is not warranted if proper jury instructions can alleviate any prejudicial effect. *Watson, supra* at 586. In this case, the instructions provided to the jury were sufficient to eliminate any prejudice that may have resulted from the prosecutor’s remarks. Therefore, defendant was not denied a fair trial because of the remark of the prosecutor indicating that a weapon was found in defendant’s presence.

Defendant also claims that the prosecutor mischaracterized the evidence by alleging that defendant fired shots at the victims of the carjacking when he only fired shots at their car. Since

defendant failed to object to this claim of improper conduct at trial, it is reviewed only for plain error. Defendant has the burden of persuasion with respect to prejudice and must show that error occurred, that the error was plain or obvious, and the plain error affected his substantial rights. *Carines, supra* at 763.

Defendant has failed to show error in the prosecutor's remark implying that defendant fired shots at the victims. Even though the bullet did not strike either of the victims, but instead struck the car, it is not improper for the prosecutor to infer, based on the testimony of the witnesses, that shots were fired at the victims rather than the vehicle alone. The prosecutor's closing argument was not improper because he merely argued facts that were already in evidence. It is well settled that a prosecutor is "given great latitude to argue the evidence and all inferences relating to his theory of the case." *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). Defendant's argument, that the prosecutor mischaracterized the evidence and improperly argued to the jury, is without merit. Therefore, defendant has failed to show that the prosecutor's conduct constitutes plain error.

Defendant next claims that the prosecutor's statement, that the vehicle in which defendant was a front passenger was stolen, was unsupported by the evidence and should not have been alleged to the jury as if it were an established fact. Since defendant failed to object to this claim of improper conduct at trial, it is also reviewed only for plain error. When examining "the record and evaluating the remarks in context, and in light of defendant's argument," we conclude that the prosecutor's remark regarding the vehicle does not constitute plain error. *Thomas, supra* at 454. Based on the testimony of several Detroit police officers, it was established that as of April 23, 2004, the vehicle, in which defendant was a front passenger, had been reported stolen. Nearly every officer that testified at trial referenced the vehicle as a stolen vehicle, which was the target of the Detroit's police departments April 23, 2004, surveillance. This Court has found that a prosecutor is "free to argue the evidence and any reasonable inferences that may arise from the evidence." *Ackerman, supra* at 450. This Court has also found that the "propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Therefore, defendant has failed to show that the prosecutor erred in his remark that the Tahoe was stolen since it was reasonable for the prosecutor to conclude, based on the testimony of several Detroit police officers, that the Tahoe had been stolen. The prosecutor's argument was proper, in light of the evidence presented, and does not constitute plain error.

Affirmed.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald